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Issue Date: 04 August 2004

Case No.: 2003-LHC-1695

OWCP No. 07-154650

IN THE MATTER OF

WARREN BILLIOT,
Claimant

v.

TRICO MARINE, INC.,
Employer

and

LEGION INSURANCE COMPANY,
Carrier

APPEARANCES:

RUSSELL RAMSEY, ESQ.,
On Behalf of the Claimant

JOHNNY L. DOMIANO, ESQ.,
On Behalf of the Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., (the "Act" or "LHWCA"). The claim is brought by Warren Billiot, Claimant, against his former employer, Trico Marine, Inc., and its carrier, Legion Insurance Company, Respondents. Claimant asserts he suffered employment-related injuries to his back for which Trico is responsible. A hearing was held on March 24, 2004 in Metairie, Louisiana, at which time

the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence[1]:

1) Joint Exhibit No. 1 and;

2) Employer's Exhibits Nos. 1-18.

This decision is being rendered after giving full consideration to the entire record.

STIPULATIONS[2]

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction.

2) Date of injury/accident: June 7, 1999.

3) Injury in course and scope of employment. Yes.

4) Date of previous injury/accident: August 1993 while employed with Northbank Towing Corp.

5) Employer/Employee relationship at time of June 7, 1999 accident(s): Yes.

6) Date employer advised of injury: June 7, 1999.

7) Date Notice of Controversion filed: October 16, 2000.

8) Date of informal conference: March 13, 2003.

9) Plaintiff's date of birth: October 28, 1963.

10) Average weekly wage: $901.50.

11) Compensation payments/benefits by or on behalf of Trico have been made to or on behalf of Billiot in accordance with Employer's Exhibits 16 and 16(B).

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[1] The following abbreviations will be used in citations to the record: JX – Joint Exhibit, CX - Claimant's Exhibit, RX –Employer's Exhibit, and TR – Transcript of the Proceedings.

[2] TR. 5-6.

ISSUES

The unresolved issues in these proceedings are:

1) Employer's entitlement to Section 8(f) relief;

2) Whether disability is permanent total or permanent partial;

3) Claimant's ability to return to gainful employment;

4) Claimant's loss of earning capacity, if any;

5) Amount of attorney's fees or penalties due, if any.

SUMMARY OF THE EVIDENCE

Claimant, Warren Billiot was born in June 1963 and lives in Houma, Louisiana. Having finished the ninth grade, his first few jobs were in the shrimping industry and doing laboring type of work (i.e. deck-hand). He later did deck-hand work for Northbank Towing and Port Marine. Tr. pp. 17-20.

Mr. Billiot worked for Northbank from 1989-1993 and while working there as a deck-hand he injured his back in August of 1993. EX-3, p. 44. Following conservative treatment, Dr. Landry diagnosed bulging discs and performed a lumbar laminectomy and discectomy at L5-S1. In February 1994, Dr. Landry discharged Mr. Billiot with a 10% permanent partial disability and restricted him from work requiring repetitive lifting of over 40 pounds. EX-1, p. 22. Claimant testified that after his surgery he was able to perform his shrimping job.

Thereafter, Mr. Billiot worked in various jobs until he started at Trico Marine in February 1997. Claimant testified that Trico never made any special arrangements for Claimant to work light duty because of his 1993 back injury. Tr. p. 36. However, Claimant later on cross-examination admitted after looking at emergency room hospital records, that in June 1998 Claimant complained of back pain of a one week duration and that Trico had placed him on light duty. Tr. pp. 37, 38.

Claimant's present back injury occurred in June 1999 working for Trico, while bending over to pick up a hose. Tr. pp. 25, 35. He returned to work and was placed on light duty until September 11, 1999. He then underwent his second lumbar surgery. Dr. Haydel performed a laminectomy at L4-5. EX-2, p. 18. On January 10, 2000 Dr. Haydel released Claimant for modified work with restriction of 25 pound lifting frequently and 40 pounds occasionally.

Dr. Haydel assigned Claimant at 12% whole body impairment. EX-2, p. 24. Claimant continued to have back pain which radiated down his left leg. On March 27, 2000 Mr. Billiot was seen by Dr. Kenneth Vogel, a neurosurgeon. After a discogram, Dr. Vogel diagnosed multiple disc pathology and recommended lumbar interbody cage fusion of L4-5 and L5-S1 plus an IDET procedure at L3-4.

These recommendations were agreed to by a reviewing doctor, Dr. John Steck and Mr. Billiot on March 5, 2001 proceeded with the surgery. Dr. Steck opined that Claimant had degenerative disc at L4-5 with a central disc herniation that was deforming the thecal sac and mild degenerative or arthritic change at the L3-4 segment. He stated that the degenerative changes more than likely preceded Claimant's 1999 injury. EX-2, p. 13.

Dr. Vogel, after the surgery in July 2001 concluded that Claimant had a 15-20% permanent partial total body medical impairment. He advised Claimant to avoid lifting, pulling or pushing over 30 pounds or bending repeatedly on a permanent basis. EX-6, pp. 47, 48. He released Claimant to perform sedentary to light duty work. EX-6, pp. 48-57. Dr. Vogel found Claimant had reached MMI in March of 2003.

Claimant testified that after his last back surgery in June of 1999, he has not looked for other employment, other than he "tried to do a little shrimping with my friend on his boat." Tr. p. 39.

The Employer's witness, Dorothy Moffett, a licensed vocational rehabilitation counselor testified that testing of Claimant indicated a third to sixth grade level. However, based on his education and transferable skills he functions at an eight to ten grade level. Tr. pp. 106-107. Ms. Moffett performed three job market surveys, May 2002, October 2002 and February 2004.

In 2004 she found the following jobs: security guard at Inner Parish Security ($6.00 an hour); shift manager with LA Works ($6.50 an hour); security guard at Hub Enterprises ($6.00 an hour) and auto parts counter clerk at O'Reilly Auto Parts ($6.50 an hour). Ms. Moffettt found that all were suitable jobs for Mr. Billiot, considering his restriction abilities, interests and skills. Tr. pp. 108-109; EX-9, pp. 7-8.

After his last back surgery in September 1999, Claimant "tried to do a little shrimping with my friend on his boat." Tr. p. 39. However, Claimant couldn't do it and did not look for any other employment and did not fill out any job applications. Tr. p. 40. Claimant admitted that he told Ms. Moffett that he was not interested in the jobs that she had found as suitable. Tr. p. 45.

On cross examination, employer's attorney asked Claimant the following question:

> Q. "Mr. Billiot, if we were to find you a job that fit within those restrictions Dr. Vogel gave you, do you believe that you can work an eight hour day?"

The Claimant answered:

> A. "It's a possibility; it depends what kind of work it is." Tr. pp. 4-5.

The Employer presented as a witness, Mr. Robart, who performed surveillance on Mr. Billiot on March 18 and 19 of 2004 who testified he observed him for four to five hours performing various activities relating to the disassembling, cleaning and painting of a riding lawn mower. He saw Claimant carrying the motor of the tractor and estimated the weight at 50 to 70 pounds. (Tr. pp. 64-65).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed.2d 221 (1994).

JURISDICTION AND COVERAGE

This dispute is before the Court pursuant to 33 U.S.C. §919(d) and 5 U.S.C. §554, by way of 20 C.F.R. §§ 702.331 and 702.332. *See Maine v. Brady-Hamilton Stevedore Co.,* 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the Longshore and Harbor Workers' Compensation Act, a worker must satisfy both a situs and a status test. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed.2d 406 (1985); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed.2d 225 (1979). The

situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the workers' activities. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 904 (5th Cir. 1999); *P.C. Pfeiffer Co.,* 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed.2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. §903(a), and the status test originates from § 2(3), 33 U.S.C. §902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed.2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." *Id*. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." *Id*. To be eligible for compensation, a person must be an employee as defined by 2(3) who sustains an injury on the situs defined by 3(a). *Id*.

In this case, the parties do not contest jurisdiction under the Act. Mr. Billiot worked for Trico as a laborer who cleaned tanks from ocean-going ships. EX-8, p. 35. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. *Graham v. Newport News Shipbuilding & Dry Dock Co.,* 13 BRBS 336, 338 (1981); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed.2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *Hampton v. Bethlehem Steel Corp.,* 24 BRBS 141, 143 (1990).

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. *Del Vecchio v. Bowers*, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP, 688 F.2d 862, 865* (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation

must be resolved based upon the evidence as a whole. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984); *Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 15, 21 (1991).

Mr. Billiot injured his back on June 7, 1999 in an incident arising out of an in the course of his employment with Trico. His assertion is not disputed by Respondents and is fully supported by the evidence. JX-1. Therefore, the Court finds that Mr. Billiot has established a *prima facie* case of compensability and that Respondents have not rebutted the § 20(a) presumption of causation. Given the foregoing, the Court finds that Mr. Billiot suffered a work-related injury to his back on June 7, 1999.

NATURE/EXTENT OF DISABILITY & MAXIMUM MEDICAL IMPROVEMENT

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America,* 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *SGS Control Servs. v Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask*, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. *Berkstresser v. Washington Metro. Area Transit Auth.,* 16 BRBS 231 (1984); *SGS Control Servs*., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 235 n.5, (1985); *Trask*, 17 BRBS at 60; *Stevens v. Lockheed Shipbuilding Co*., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefits of medical treatment such that his condition will not improve. This date is primarily a medical determination. *Manson v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record,

regardless of economic or vocational consideration. *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp*., 20 BRBS 184, 186 (1988); *Williams v. General Dynamic Corp*., 10 BRBS 915 (1979).

In this case Dr. Vogel, who performed the 2001 lumbar surgery, concluded on March 24, 2003 the Mr. Billiot had reached maximum medical improvement. EX-6, p. 6. The parties have not disagreed with this finding therefore the Court finds that Mr. Billiot's disability with respect to his June 7, 1999 injury became permanent on March 24, 2003.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. *See Manigault v. Stevens Shipping Co*., 22 BRBS 332 (1989); *Harrison v. Todd Pac. Shipyards Corp*., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. *Rinaldi v. General Shipbuilding Co.*, 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *McCabe v. Sun Shipbuilding & Dry Dock Co.,* 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. *Thompson v. Lockheed Shipbuilding & Constr. Co*., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co*., 22 BRBS 332 (1989).

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *See Williams v. Halter Marine Serv*., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. *See* 33 U.S.C. § 908(c); *Southern v. Farmers Export Co*., 17 BRBS 64 (1985).

The Court finds that Mr. Billiot has established a *prima facie* case of total disability. The employer in its post hearing brief has agreed that they are not contesting that Mr. Billiot has a permanent partial disability that prevents him from returning to his previous position at Trico. (Employer's Post-Hearing Brief, p. 3).

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan,* 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to

the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co*., 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it's within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). Where the employer withdraws its light duty job, for example if Claimant was laid off, the burden of establishing subsequent, suitable alternative employment remains with the employer. *Mendez, supra*.

Claimant is obligated to take employment within his physical restriction and Employer is responsible for the difference between Claimant's new weekly wage and his former weekly wage. When suitable alternative employment is shown, the wages which the new positions would have paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp*., 23 BRBS 327, 330 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2nd Cir. 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. National Steel and Shipbuilding*, 10 BRBS 649, 660 (1979).

Claimant has made a *prima facie* case for total disability based on his back condition, and his resultant inability to return to his job as a roustabout. Employer agrees that Claimant is not capable of returning to his former position.

In this case Claimant argues that the jobs identified by Ms. Moffett's labor market surveys were unsuitable. I disagree. Although some of the jobs listed a high school degree which Mr. Billiot lacks, most of those employers gave applicants without the degree more emphasis on their experience, loyalty, attitude and other qualities Tr. pp. 124-126. Specifically, this Court finds that any one of the four jobs Ms. Moffett offered in her March 2004 job market survey were suitable jobs for Claimant. Those jobs were

all light to medium with only the Inner Parish Security job being medium, since it has duties which may require lifting 35 pounds. Dr. Vogel had placed a 30 pound restriction on Claimant. Dr. Vogel testified that Claimant can work at light or sedentary jobs or with a 30 pound lifting restriction. Dr. Vogel deferred to Ms. Moffett's expertise as to what type of employment Claimant could engage in. EX-9(B), p. 4. Ms. Moffett therefore found that job suitable plus the security guard job with Hub Enterprise, the auto parts clerk at O'Reilly Auto Parts and the shift manager at Louisiana Works all suitable and available for Mr. Billiot. Tr. p. 108. I agree. All of said jobs are geographically available. The average hourly wage for the four jobs is $6.25.

If the employer meets its burden and shows the existence of suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. *See Williams v. Halter Marine Serv*., 19 BRBS 248 (1987). If the employee does not prove this, then his disability is at most partial and not total. *See* 33 U.S.C. § 908(c); *Southern v. Farmers Export Co*., 17 BRBS 64 (1985). In this case, the Court finds that Mr. Billiot has not demonstrated diligence and a willingness to work. Claimant testified that he never has applied for any work since the accident. Tr. p. 40. Given Mr. Billiot's lack of effort in finding suitable alternative employment this Court finds that Mr. Billiot has failed to rebut Employer's showing of suitable alternative employment in this case.

Therefore, I find that as of March 24, 2003, Claimant was permanently partially disabled, with a residual wage earning capacity of $250.00 per week ($6.25 an hour for 40 hours). The parties have stipulated and this Court accepts their stipulation based on the record evidence that Claimant's average weekly wage prior to the June 1999 accident was $901.50. Thus Claimant's compensation rate is $434.55.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. §907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co*., 16 BRBS 255, 257-258 (1984). The claimant

must establish that the medical expenses are related to the compensable injury. *See Pardee v. Army & Air Force Exch. Serv. ,* 13 BRBS 1130 (1981); *See Suppa v. Lehigh Valley R.R. Co*., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *See Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *See also Shahady v. Atlas Tile & Marble Co*., 682 F.2d 968 (D.C. Cir. 1982) (per curiam), *rev'g* 13 BRBS 1007 (1981), *cert denied*, 459 U.S. 1146 (1983); *See McQuillen v. Horne Brothers, Inc.,* 16 BRBS 10 (1983); *See Jackson v. Ingalls Shipbuilding*, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

Because Mr. Billiot established that he suffered employment-related injuries to his left hip and left wrist, Mr. Billiot is entitled to all past and future compensable medical benefits arising from those conditions.

SECTION 8(F) SPECIAL FUND RELIEF

Section 8(f) shifts part of the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in § 44 of the Act when the disability or death is not due solely to the injury that is the subject of the claim. *See Wiggins v. Newport News Shipbuilding & Dry Dock Co*., 31 BRBS 142, 146 (1997); 33 U.S.C. § 908(f) and § 944. To be entitled to compensation under §8(f) when the employee is permanently totally disabled, the employer must establish that the employee seeking compensation had: (1) an "existing permanent partial disability" before the employment injury; (2) that the permanent partial disability was "manifest" to the employer; and (3) that the current disability is not due solely to the employment injury. *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34, 35 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 14 BRBS 974, 976 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104, 113 S.Ct. 726, 74 L.Ed.2d 951 (1983); 33 U.S.C. § 908(f)(1).

With respect to the requirement of an existing permanent partial disability, the term "disability" in § 8(f) can be an economic disability under § 8(c)(21) or one of the scheduled losses specified in §§ 8(c)(1)-(20), but it is not limited to those cases alone. *C & P Tel. Co. v. Director, OWCP,* 564 F.2d 503, 513 (D.C. Cir. 1977). "Disability"

under §8(f) is necessarily of sufficient breadth to encompass those cases wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of an employment-related accident and compensation liability. *Id.*

The evidence in this case establishes that Mr. Billiot had an existing permanent partial disability before his June 7, 1999 work related back injury. Following Claimant's lumbar surgery in 1994, Dr. Landry assigned Claimant a 10% permanent partial disability. He restricted him to not lift more than 40 pounds. EX-1, p. 22. Although Claimant resumed his heavy type roustabout work at Trico, the evidence shows that Claimant had reported one week of back pain at the Terrebonne General Medical Center in 1998. Tr. pp. 36, 39. Each medical expert in this case, Drs. Landry, Haydel, Vogel and Steck testified that Claimant suffered four multiple pre-existing conditions as to his back which made Claimant more susceptible to further injury EX-1, p. 20, EX-2, p. 10, EX-6, pp. 15-16 and EX-4, pp. 9-10. I find that considering the history of Claimant's prior surgery and the medical in this case, a cautious employer would not want to have him because of the increased risk of liability without the protection of § 8(f).

I thus find that Mr. Billiot's pre-existing disability is sufficient to satisfy the first requirement of § 8(f).

With respect to the requirement of manifest knowledge by the employer, it is well established that a pre-existing disability will meet the manifest requirement of § 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable. *Wiggins v. Newport Shipbuilding & Dry Dock Co*., 31 BRBS 142, 147 (1997); *Esposito v. Bay Container Repair Co*., 30 BRBS 67, 68 (1996). The medical records pre-existing the subsequent injury need not indicate the severity or precise nature of the pre-existing condition in order for the manifest requirement to be satisfied; rather, medical records will satisfy this requirement as long as they contain sufficient, unambiguous and obvious information regarding the existence of a serious lasting physical problem. *Wiggins*, 31 BRBS at 147; *Espositio*, 30 BRBS at 69. In addition, the pre-existing disability need not be manifest at the time of hiring, but only at the time of the compensable subsequent injury. *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619, 16 BRBS 137, 139 (CRT)(9th Cir. 1983)(en banc).

In this case there are numerous medical records that clearly establish Mr. Billiot's permanent partial disability prior to his June 1999 accident. These include the hospital records for the lumbar surgery plus all of Dr. Landry's medical records.

Moreover as employer argues in this case, Trico had actual knowledge of Mr. Billiot's previous back injury and surgery in his pre-employment application and physical. Tr. pp. 30, 35. The Court finds that the existence of Mr. Billiot's pre-existing disabilities was objectively determinable based on these reports. Because medical evidence prior to June 7, 1999 is available from which the second requirement under § 8(f) is satisfied, the Court finds Mr. Billiot's pre-existing permanent partial disability was manifest to Trico Marine before Mr. Billiot's June 7, 1999 work-accident.

The third requirement for the Employer is to establish that the current disability is not due solely to the employment injury. S*ee Two R. Drilling Co. v. Director OWCP,* 894 F.2d 748, 750 (5th Cir. 1990); *Eymard &. Sons Shipyard v. Smith*, 862 F.2d 1220 (5th Cir. 1989). When the employee is permanently partially disabled, the employer must show that the current permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." *Id*. at 750. The employer bears the burden of persuasion and in this case this Court finds that this burden has been carried although Dr. Vogel in his testimony said that he could not determine what Claimant's disability would have been if Claimant had not had a pre-existing injury. However, the main factor in Claimant's current disability is the double fusion which as Dr. Steck described is a complicated procedure that often makes recovery difficult. This two level fusion was necessary because of Claimant's pre-existing injury at L5-S1 and his laminectomy. EX-4, pp., 18, 19; EX-6, p. 41.

Both Drs. Landry and Haydel testified that Claimant's current disability is greatly due to the existence of the Claimant's prior 1993 injury and but for that the last 1999 injury would result in only a 5-10 percent disability. EX-2, pp. 27-28; EX-1, p. 27.

In addition, as Employer argues, Ms. Moffett testified that had the 1999 injury been the sole injury to Claimant's back and had only required a single level laminectomy, in that instance, Claimant would likely have returned to his job as a roustabout. Tr. pp. 116, 118. Dr. Vogel testified that it would be unusual to perform a fusion in this case had it not been for the previous surgery. EX-6, p. 53. Dr. Steck agreed. EX-4, p. 15.

Considering all the evidence, I find Employer has proved that Claimant's current level of disability is "materially and substantially greater" than what would have resulted from the 1999 injury alone. Given the above, this Court finds that Trico has met all the requirements of § 8(f) and is entitled to relief under that Section.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1. Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from June 7, 1999 until March 24, 2004, based on a comp rate of $601.30.

2. Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits, based on a compensation rate of $434.55, commencing March 25, 2003 and continuing for a period of 104 weeks, after which time such permanent partial disability benefits shall be paid from the Special Fund pursuant to Section 8(f) of the Act.

3. Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. *See* 28 U.S.C. §1961.

4. Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

5. Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses, with interest in accordance with Section 1961, which are the result of Claimant's June 7, 1999 injury.

6. Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

A

RICHARD D. MILLS
Administrative Law Judge